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No. 280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

OTIS HARRISON, Trustee,

Petitioner,

v.

DAVID S. PHILLIPS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FENTRESS BRACEWELL
First City National Bank Building
Houston 2, Texas

JOE H. REYNOLDS
DEWEY S. WALKER
JOSEPH JAWORSKI,
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Of Counsel:

BRACEWELL, REYNOLDS & PATTERSON
First City National Bank Building
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BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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No.

In The

Supreme Court of the United States

October Term, 1961

Otis Harrison, Trustee,

Petitioner,

v.

David S. Phillips,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Otis Harrison, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case (No. 18,642 below).

CITATION TO OPINION BELOW

The per curiam opinion of the Court of Appeals, printed in Appendix B hereto, infra p. 3a, is reported at ___ F. 2d ___. The opinion of the District Court (R. 14-21), printed in Appendix B hereto, infra p. 5a, is reported at 185 F. Supp. 204.

JURISDICTION

The judgment of the court below, dismissing the appeal for failure to state a claim upon which relief could be

granted, was dated and entered May 9, 1961 (Appendix B, infra, p. 12a). No petition for rehearing was filed with the Court of Appeals. Jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. §1254 (1), and Supreme Court Rule 22(3).

QUESTIONS PRESENTED

Section 23(d) of the Surplus Property Act of 1944 created repurchase priorities in former owners of real estate who sold their property to the Government for war-time use. The Federal Properties & Administrative Services Act of 1949 repealed section 23(d), abrogating the repurchase priorities created under the 1944 Act. The Court of Appeals for the Fifth Circuit has construed the repurchase priorities as being "gratuities" which could be withdrawn at any time and further held that the 1944 Act was temporary in nature, thereby creating only temporary repurchase priorities.

The questions presented in determining whether petitioner has stated a claim upon which relief can be granted are:

(1) Whether the repurchase priority was permanent in nature and created Constitutional rights which could not be abrogated by the attempted 1949 repeal where:

(a) The former owner sold the property in question to the Government *after* the 1944 Act was passed, section 23(d) thereby becoming an essential part of the contract between the parties.

(b) The Government negotiators represented to the former owner that he had the option to repurchase the land in accordance with section 23(d) and in reliance thereon, conveyance was made to the Government.

(2) Whether parol testimony of a consideration to a deed is admissible where:

(a) The consideration expressed in the contract to convey the property was "One Dollar ($1.00) and other valuable considerations . . .".

(b) The consideration expressed in the deed itself was "the sum of Twenty-Eight Thousand Two Hundred Dollars ($28,200.00) to us cash in hand paid . . .".

(c) The consideration sought to be proved is not inconsistent with the consideration expressed either in the contract to convey or the deed itself.

(3) Whether the Surplus Property Act of 1944 was sufficient authority to a Government negotiator to enable him to bind the United States to reconvey property to its former owner in accordance with the provisions found in section 23(d) of the Act.

The following additional questions presented concern the Federal jurisdiction of this cause, and are before this Court although they were not directly passed on by the Court of Appeals:

(5) Whether a suit against a Regional Commissioner of the General Services Administration, in his individual capacity, is a suit against the United States in derogation of the sovereign immunity doctrine where:

(a) The defendant was acting pursuant to an unconstitutional statute and therefore acting *ultra vires* his authority.

(b) The plaintiff seeks a declaratory judgment to establish a right to repurchase Government property according to a section of a statute which he alleges was unconstitutionally repealed.

(6) Whether the Federal District Court of the locality will take jurisdiction of a cause against a subordinate Federal officer without the presence of the superior where the ground of complaint is that the statute under which the subordinate officer is acting is itself unconstitutional.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statute primarily relied upon for requesting issuance of a writ of certiorari is the Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C. Appendix, §1632(d) (40 U.S.C. §471).

Other provisions involved are United States Constitution, Amendment V and the Federal Properties and Administrative Services Act of 1949, 63 Stat. 377, 41 U.S.C. §233. The foregoing constitutional provision and statutes are printed in Appendix A, infra, p. 1a.

STATEMENT

This action was instituted by petitioner on May 6, 1960 against respondent, the Regional Commissioner of the General Services Administration, as an individual, as well as in his representative capacity. (R. 4). The basis for jurisdiction in the Federal District Court was twofold; (1) the action arises under the Fifth Amendment to the Constitution of the United States and under the Surplus Properties Act of 1944; and (2) the amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars. (R. 4, 10)

The action as instituted was for a declaratory judgment to establish in petitioner a right to repurchase his former real property from the United States Government. The appeal is from an order dismissing the suit upon the ground

that a claim upon which relief could be granted was not stated.

Petitioner was the owner of a certain 486.56 acre tract of land located in Harris County, Texas in 1945. Just prior to that time representatives of the United States Coast Guard approached petitioner relative to the purchase of 282 acres thereof for national defense purposes. The negotiators of the United States represented to petitioner that under then-existing Federal legislation (Section 23(d) of the Surplus Property Act of 1944) petitioner would have the right to repurchase when the property ceased to be used by the Government and when the property was declared surplus. (R. 5.)

The statute itself and these representations were relied upon by petitioner in deciding whether to sell the land and in deciding what the purchase price should be. Accordingly, the land was sold to the United States pursuant to a contract to convey and a warranty deed. (R. 6-7.)

The land was never put to any defense use, nor was it declared surplus after the war ended. In 1949, unbeknowing to petitioner, Congress repealed the repurchase priorities which had formed a part of the consideration to the sale of the land. Thereafter, in 1950 and 1951 petitioner began inquiries as to when he might be allowed to exercise his right to repurchase according to the 1944 statute and in accordance with the terms of the contract of conveyance and in accordance with the considerations resulting in the deed of conveyance. He was told by these various Government agencies that his request would be considered in accordance with the terms of the original agreement. (R. 7-8.)

Thereafter, on January 15, 1960 the General Services Administration reported to petitioner that the property had been declared surplus but that he would not be allowed to repurchase his land according to the 1944 Act, because

that repurchase priority had been abrogated by Congress in 1949. Subsequently, the Dallas Office of the General Services Administration notified petitioner that one-half of the land was being denoted for use as a junior college site and that the remaining portion would be offered for sale by public auction on May 9, 1960. (R. 9-10.)

Petitioner then filed this suit to declare his right to repurchase in accordance with his original contract with the Government, asserting that the action of the respondent unconstitutionally denied petitioner of his vested property rights without due process of law.

The respondent filed a motion to dismiss (R. 12-13) on two grounds: (1) for lack of jurisdiction of the subject matter, alleging that this in effect was a suit against the United States in contravention of the sovereign immunity doctrine and (2) for failure to state a claim upon which relief could be granted. The Trial Court, without a hearing dismissed the suit upon the latter of these two grounds, declining to take action on the question of jurisdiction. (R. 14-22.) The Court of Appeals in a per curiam opinion affirmed the Trial Court's dismissal. (Appendix B, infra. p. 3a.)

REASONS FOR GRANTING THE WRIT

There are several compelling reasons why a review on writ of certiorari should be granted in this case:

(1) The Court of Appeals has decided an important question of Federal and Constitutional law which has not been, but should be, settled by this Court.

(2) The Court of Appeals has rendered a decision in conflict with the decision of the Court of Appeals for the D. C. Circuit.

(3) The Court of Appeals has decided important questions of substantive law in conflict with the applicable local and Federal decisions.

(4) Inherent in this case is an extremely important jurisdictional question which should be settled by this Court.

1. Important Unsettled Federal Questions

The Courts below have construed section 23(d) of the Surplus Property Act of 1944 (infra, p. 1a) to have conferred upon former owners of real estate only a "privilege" or a "gratuity" (R. 19) which could be withdrawn by Congress at any time without obligating the Government to pay just compensation therefor. Furthermore, it has been held below that the repurchase priority was "temporary" in nature, expiring by the Act's own terms. (R. 18.) Petitioner urges that this is an unwarranted construction of this portion of the Act, especially in view of the facts involved in this case.

The precise question here presented has not been before any other Court of Appeals nor has this portion of the statute ever been construed by this Court. Here is a situation where Congress passed a statute guaranteeing to landowners the right to repurchase their real estate after the War ended and after the property was declared surplus to the needs of the Government. This petitioner is one of the former owners who sold his land to the Government *after* the Act was passed and in specific reliance thereon. He is one of the landowners who executed a contract to convey his land and decided the sales price by relying upon the fact that he could repurchase the land in accordance with section 23(d). Reliance was placed both on the statute itself, as well as on the representations made by the Government negotiators.

Accordingly, it is petitioner's position that the repurchase priorities became a part of the contract (1) because of the well-settled rule that existing statutes becomes a part of and must be read into contracts, *Bulkey* v. *United States*,

19 Wall. 37 (1874), and (2) because of the express oral representations made by the purchaser to the seller (the representations, being a part of the consideration, are admissible. See p. 7, infra.). Petitioner contends that Congress intended these priorities as lasting and absolute rights in former property owners. The Congressional intent is plain that these vested rights were not to expire at the end of the War, but were to remain in each former owner *until he had been given the opportunity to repurchase his land.* H.R. 1890; U.S. Code Cong. Service, 78th Cong. 2d Session, 1944, pp. 1303-1305; H.R. 1757, 78th Cong., 2d Session, 8/10/44, pp. 4-5; H.R. 1756, 78th Cong., 2d Session, 8/10/44, pp. 7 and 11. In 1949 when Congress repealed section 23(d), it amounted to a confiscatory impairment of petitioner's inviolate contract rights and as such is wholly contrary to the letter and spirit of the United States Constitution.

As mentioned above this Court has not passed upon this important question presented. Furthermore, no lower Federal Court has been confronted with a factual situation based upon the legal theories involved in the merits here. Several suits have reached the Federal Courts seeking recovery under the repurchase priority of the 1944 Act but not one was based upon impairment of contract rights. See *New Haven Public Schools* v. *General Services Administration*, 214 F. 2d 592 (7 Cir. 1954); *Seiden* v. *Larson*, 188 F. 2d 661 (D.C. Cir. 1951) Cert. Den. 341 U.S. 950; *Trueman Fertilizer Co.* v. *Larson*, 196 F. 2d 910 (5 Cir. 1952); *Anderson* v. *United States*, 229 F. 2d 675 (5 Cir. 1956); *Mason* v. *United States*, 169 F. Supp. 507 (C.Cl. 1959); *Highsmith* v. *Southwestern Medical Foundation*, 116 F. Supp. 958 (N.D. Tex. 1953). Most of these cases were disposed of upon the theory that the suit was one against the United States in derogation of the sovereign immunity doctrine. The precise construction of the statute was never reached by these courts. Others involved situations where the land was con-

demned or purchased by the Government before passage of the Act precluding the application of any contract theory.

The importance of the questions presented is obvious. Petitioner submits that the Court of Appeals has placed an unwarranted construction on the 1944 Act in order to save the constitutionality of the repealing 1949 Act. It must be finally determined whether the 1944 Act created priorities which could become the basis of a contract subject to Constitutional protection. The Constitutional rights of many former landowners similarly situated should be finally declared.

2. Conflict

Only one Court of Appeals has placed any sort of construction upon section 23(d) of the 1944 Surplus Property Act. The Court of Appeals in *Seiden* v. *Larson*, 188 F. 2d 661 (D.C. Cir. 1951), cert. den. 341 U.S. 950, Appendix C, infra, p. 13a, briefly discussed the nature of the repurchase priority provided for in the Act. The Court affirmed the District Court's dismissal of the plaintiff's cause on the ground that the suit was against the United States and it had not consented to be sued. In dictum, however, the Court recognized that former owners of section 23(d) property had an interest in such property greater than that of an ordinary prospective purchaser. Furthermore, it was said that:

> "We are reluctant, however, to decide the case on the narrow basis that appellants' interest has ceased, and that their present status is merely that of a member of the general public."

The facts in *Seiden* were quite different from those presented in the instant case: the property there was purchased prior to the enactment of the Surplus Property Act of 1944, precluding any theory of contract; the Court was primarily concerned with the question of jurisdiction and the sovereign immunity doctrine; the dispute was over the Admin-

strator's discretionary classification of the subject property as "war housing," which property is specifically excluded from section 23(d); and the properties there involved had been the subject of a large expenditure by the Government resulting in improvements of a kind not so related to the former use of the property, or so personal to the former owner as to give rise to any equitable claim by him to the property.

Without these circumstances favorable to the Government's position, the language of the opinion reveals that the decision might well have been different. None of these circumstances are present in the instant case and, in addition, the sovereign immunity doctrine is inapplicable to the case at bar. (This subject is treated infra, p. 8.)

Even in the light of the above, the District Court and the Court of Appeals (through adoption to the lower court's opinion) relied upon *Seiden* as authority for upholding dismissal of this cause. Petitioner submits that *Seiden* does not provide such authority as to warrant dismissal and in fact, a close reading of that opinion reveals that had the Court of Appeals for the District of Columbia been presented with the facts in this case, a different result would have been reached. Consequently, by no stretch of the imagination can *Seiden* be said to be authority for the proposition that section 23(d) created merely "gratuities" or "privileges" subject to withdrawal at the whim of Congress.

Notwithstanding this, the remainder of the cases dealing with section 23(d) (the majority of which are dismissed for want of jurisdiction) simply cite *Seiden* v. *Larson*, saying that the priority was merely a "gratuity". This reveals the utter state of confusion and conflict in the Circuit Courts concerning the proper construction of section 23(d), which only a decision from this Court can correct. See, for instance, *Mason* v. *United States*, 169 F. Supp. 507 (C.Cl. 1959).

3. Error in Local and Federal Law

The Court of Appeals has decided an important question involving the application of the parol evidence rule contrary to the applicable local and Federal decisions. The Court below and the Trial Court held that proof of the oral representations made by the purchaser to petitioner would be barred by the "parol evidence rule". (R. 18 and 20.)

This holding, to say the least, is a wide departure from the well-settled local and Federal decisions. Contrary to the holding below, the admissibility of this evidence is determined by Texas law. Rule 43(a), Federal Rules of Civil Procedure, 28 U.S.C.A.; *Patterson-Ballagh Corp.* v. *Jackson*, 145 F. 2d 786 (9 Cir. 1944). This point is academic, however, because the Federal and local decisions agree that where the contract in question is ambiguous or appears partially incomplete, then it may be supplemented by proof of other oral terms outside the terms of the document, *especially when the evidence is intended to add to a recital of consideration*. *Richardson* v. *Traver*, 112 U.S. 424 (1884); *Jenkins* v. *Pye*, 37 U.S. 253 (1838); *Lewis* v. *Bell*, 58 U.S. 616 (1854); *Faville* v. *Robinson*, 201 S.W. 1061 (Civ. App. 1918); *Manton* v. *City of San Antonio*, 207 S.W. 951 (Civ. App. 1919); *Ewing* v. *McGee*, 314 S.W. 2d 158 (Civ. App. 1958), error dism.; Texas Law of Evidence, McCormick and Ray, Vol. 2, Sec. 1613, p. 460-461.

The consideration clause in the contract to convey involved herein recited only nominal consideration of One Dollar and then specifically stated that other consideration passed between the parties to the transaction. The contract stated:

> "*In consideration of One Dollar ($1.00) and other valuable considerations*, the receipt and sufficiency of which are hereby acknowledged, the undersigned . . .

agrees to convey to the United States of America . . . the following described land. . . ." (Emphasis supplied.)

Petitioner's complaint made it abundantly clear that the provisions of section 23(d) and the representations made by the Government negotiators pursuant thereto constituted an essential part of the consideration for the contract to convey and the subsequent conveyance. (R. 6-7.) These facts prohibit the application of the "parol evidence rule" to this case.

The decisions of the Court below and the Trial Court are in direct conflict with those of this Court and the Texas Courts.

4. Jurisdiction

Inherent in this case is an extremely important jurisdictional question which should be settled by this Court. The question of Federal jurisdiction of the subject matter is always before this Court, even though the Courts below dismissed the cause on other grounds. *United States* v. *Corrick*, 298 U.S. 435, 440 (1936).

Respondent has contended throughout the course of this litigation that this suit cannot be maintained because it is a suit against the United States in contravention of the sovereign immuniy doctrine. Petitioner submits that this suit falls within an exception to the rule and suit is properly against respondent individually.

Respondent in this action is the Regional Commissioner of the General Services Administration. The complaint alleges that respondent, relying on the 1949 repeal of the 1944 Act, denied petitioner of his Constitutional rights guaranteed by the Fifth Amendment in refusing to abide by the contract to reconvey. (R. 9, 10.) Accordingly, his acts were not those of the Federal Government's but rather were those

of the Respondent's individually. He was acting in his own capacity as a matter of law and necessarily not as an officer or agent of the United States.

It is a generally recognized rule that a suit against Federal officers or agents, attacking the constitutionality of a Federal statute, or otherwise seeking relief from an alleged invoked statute, is not a suit against the United States and is not prohibited by the sovereign immunity doctrine. *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949).

In *Larson* this Court noted at pages 690-692 that there is a category of cases where an official asserts his authority under a certain statute and the injured plaintiff challenges the constitutionality of that statute. In this type of case, this Court held, the Federal Courts are not barred from adjudicating a claim against a Governmental agent who invokes statutory authority for his action if the Constitutional power to give him such a claim of immunity is itself challenged. Petitioner submits that this case falls directly within this category of cases.

There is language in a footnote in *Larson* (p. 691) to the effect that sovereign immunity *may* become relevant in certain cases because the relief prayed for may require affirmative action by the sovereign or the disposition of unquestionably sovereign property. See also Mr. Justice Frankfurter's dissenting opinion at p. 715.

Respondent has argued below that the title to the land in question is now in the sovereign, and this fact necessarily makes this a suit against the sovereign, notwithstanding the jurisdictional exception noted above. Petitioner submits that the contrary is true and relies specifically upon a recent case decided by the District of Columbia Circuit, *West Coast Exploration Co.* v. *McKay*, 213 F. 2d 582 (D.C. Cir. 1954).

McKay discusses the precise point here involved analyzing both *Larson* v. *Domestic* and *Seiden* v. *Larson*. The relevant excerpt from the *McKay* opinion is printed in Appendix C, infra p. 27a. It will be noted that the *McKay* case overrules *Seiden* v. *Larson* insofar as it construes *Larson* v. *Domestic* on the jurisdictional question, holding that the jurisdictional exception to the sovereign immunity doctrine, within which this case falls, is still applicable, even though Government property is involved.

In cases like the case at bar where petitioner challenges action by an administrative official relative to Government property, the two main questions involved are: (1) has the plaintiff stated a cause of action upon which relief can be granted, and (2) is the suit actually one against the sovereign, to which it has not consented? These two questions are necessarily closely inter-related in the instant case and in fact they blend together. (See *Seiden* v. *Larson*, 188 F. 2d 661 at 663-4 (D.C. Cir. 1951), Appendix C, infra p. 13a, 16a-17a). Indeed, it seems that the Courts below tacitly dismissed this cause for the latter of the two reasons because reliance was placed on *Seiden* v. *Larson* which dismissed plaintiff's suit because it was against the United States, and the United States had not consented to be sued.

Consequently, it appears that the Court of Appeals here rendered a decision based upon a case which had been overruled (*Seiden* v. *Larson*, overruled by *McKay*) and in direct conflict with the *McKay* opinion rendered by the Court of Appeals for the D. C. Circuit and also in a way in conflict with the decision rendered by this court in *Larson* v. *Domestic*. There were several dissents in *McKay*. (*West Coast Exploration Co.* v. *McKay*, supra, p. 613) as to the true meaning of this Court's holding in *Larson* v. *Domestic*. Because of the extreme importance of the questions involved, they should be settled by this Court.

An additional question is also presented by this case regarding whether respondent's superior was an indispensable party to this suit. See *Colorado* v. *Toll*, 268 U.S. 228 (1925) where this Court held that where the ground of complaint is that the statute under which the subordinate Federal officer is acting is itself unconstitutional, the Federal District Court of the locality will take jurisdiction without the presence of the superior.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated July 31, 1961.

Respectfully submitted,

FENTRESS BRACEWELL
JOE H. REYNOLDS
DEWEY S. WALKER
JOSEPH JAWORSKI,
Counsel for Petitioners

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States
Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Surplus Property Act of 1944

Sec. 23(d)(1)(A). In the case of any surplus real property which was acquired by any Government agency after December 31, 1939, the person from whom such property was acquired shall be given notice, in such manner (which may include publication) as the Board by regulation may prescribe, that the property is to be disposed of by the United States and shall be entitled to purchase such property, in substantially the identical tract as when acquired from such person, at private sale at any time during the period of ninety days following such notice: *Provided*, That such period shall be extended in any case when it appears that such extension is necessary or appropriate to facilitate the sale of any surplus real property under this subsection.

Sec. 23(3). The price to be paid for surplus real property sold under this subsection shall be a price

not greater than that for which it was acquired by the United States, such acquisition price being properly adjusted to reflect any increase or decrease in the value of such property resulting from action by the United States, or a price equal to the market price at the time of sale of such property, whichever price is the lower.

Sec. 38. Unless extended by law, this Act shall expire at the end of three years following the date of the cessation of hostilities in the present war. For the purposes of this section the term "date of the cessation of hostilities in the present war" means the date proclaimed by the President as the date of such cessation, or the date specified in a concurrent resolution of the two Houses of Congress as the date of such cessation, whichever is the earlier.

Federal Properties and Administrative Services Act of 1949

Sec. 502(a). There are hereby repealed — (1) the Surplus Property Act of 1944, as amended (except sections 13 (d), 13 (g), 13 (h), 28, and 32 (b) (2)), and sections 501 and 502 of Reorganization Plan Numbered 1 of 1947; *Provided*, That, with respect to the disposal under this Act of any surplus real estate, all priorities and preferences provided for in said Act, as amended, shall continue in effect until 12 o'clock noon (eastern standard time), December 31, 1949 . . .

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

Court of Appeals Opinion

In The

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 18642

OTIS HARRISON, TRUSTEE,

Appellant,

versus

DAVID S. PHILLIPS, Regional Commissioner of the General Services Administration, Region 7, of the United States of America;

Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(May 9, 1961.)

Before TUTTLE, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

PER CURIAM: The district court granted a motion of the defendant, who is appellee here, to dismiss the appellant's complaint on the ground that the complaint did not state a claim upon which relief could be granted. *Harrison, Trustee,* v. *Phillips, Regional Commissioner, etc.*, 185 F. Supp. 204. We are in agreement with the conclusion reached by the district court and its judgment is AFFIRMED.

Court of Appeals Judgment

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1960

No. 18,642

D. C. Docket No. 13,131 Civil

OTIS HARRISON, Trustee,

Appellant,

versus

DAVID S. PHILLIPS, Regional Commissioner of the General Services Administration, Region 7, of the United States of America,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

Before Tuttle, Chief Judge, and Hutcheson and Jones, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 9, 1961

District Court Opinion

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

OTIS HARRISON, Trustee,
Plaintiff.

VS.

DAVID S. PHILLIPS,
Regional Commissioner of the
General Services Administration,
Defendant.

CIVIL ACTION
NO. 13,131

Bracewell, Reynolds & Patterson (Joe H. Reynolds and Joe Jaworski), of Houston, Texas; for plaintiff.

William B. Butler, United States Attorney, and Arthur L. Moller, Assistant United States Attorney, of Houston, Texas; for defendant.

JULY 21, 1960

Action for declaratory judgment to establish in plaintiff a right to repurchase real property from the United States of America under Section 23(d) of the Surplus Property Act of 1944, which was repealed by Section 502(a) of the Federal Property and Administrative Services Act of 1949. The case is before the court upon defendant's motion to dismiss for lack of jurisdiction of the subject matter and of defendant and for failure to state a claim upon which relief can be granted.

Plaintiff alleges that he was the owner of a certain 486.56-acre tract of land in the Wm. M. Jones League, Abstract No. 482, Patent No. 371, in Harris County, Texas, prior to November 1945. Before said date he was contacted by representatives of the United States Coast Guard who negotiated to purchase the property for defense purposes. Two hundred eighty-two acres thereof were conveyed to the United States of America for a valuable consideration by general warranty deed. Plaintiff contends that the Coast Guard represented to him that under an Act of Congress he would have the right to repurchase the property if the Government ceased its use thereof and if said property were declared to be surplus property.

At the time of the sale of his property plaintiff would show that the following provisions of the Surplus Property Act of 1944 were then in effect. Section 23(d) thereof reads as follows:

> "(1)(A) In the case of any surplus real property which was acquired by any Government agency after December 31, 1939, the person from whom said property was acquired shall be given notice in such manner . . . as the Board by regulation may prescribe, that the property is to be disposed of by the United States and shall be entitled to purchase such property, in substantially the identical tract as when acquired from such person, at private sale at any time during the period of ninety days following such notice . . .
>
> "(3) The price to be paid for surplus real property sold under this subsection shall be a price not greater than that for which it was acquired by the United States, such acquisition price being properly adjusted to reflect any increase or decrease in the value of such property resulting from action by the United States or a price equal to the market price at the time of the sale of such property, whichever price is lower."

Plaintiff maintains that the sale price of the property was arrived at taking into consideration the aforesaid statute, which constituted an essential element of the contract of sale. He claims that by reason of the statute and the representations concerning it the right of repurchase became vested in plaintiff at the time of conveyance.

The expiration date of the Surplus Property Act of 1944 was at the end of three years following the date of the cessation of hostilities in World War II, which was proclaimed to be December 31, 1946, by the President in Proclamation No. 2714, 61 Stat. 1048. Furthermore, the Surplus Property Act, including Section 23(d), was repealed by Section 502(a) of the Federal Property and Administrative Services Act of 1949, which terminated all priorities and preferences under the 1944 Act as of December 31, 1949.

Plaintiff alleges that on January 15, 1960, the General Services Administration reported to him that his former property had been determined surplus to the needs of the Government. He was further advised that his right of repurchase was abrogated since the 1944 Act had been repealed by the 1949 Act. He was notified that the eastern half of the property, consisting of approximately 141 acres, would be offered for sale by public auction on May 9, 1960, and that the balance of said property was being held in reserve for possible use as a junior college site.

Plaintiff contends that defendant placed the property for public auction in violation of the terms of the contract of conveyance between the Government and himself and in denial of due process of law guaranteed by the Fifth Amendment. Insofar as the 1949 Act impairs the obligation of said contract plaintiff claims that the statute deprives him of his property without due process of law. He prays that the Court declare that the provisions of Sec-

tion 23(d) of the 1944 Act constitute a vested contractual right in plaintiff that is binding upon defendant and that the 1949 Act is inapplicable to the vested right of plaintiff. In the alternative, he prays that the court find the 1949 Act unconstitutional insofar as it applies to plaintiff and that the acts of defendant are void and unconstitutional.

Defendant contends that the complaint should be dismissed for lack of jurisdiction of the subject matter and of defendant and for failure to state a claim upon which relief can be granted. Regarding plaintiff's alleged failure to state a claim upon which relief can be granted, defendant maintains (1) that any repurchase priority to which plaintiff was entitled was only temporary in nature and expired by the terms of the 1944 Act on December 31, 1949; (2) that any such priority was abrogated by the repeal of the 1944 Act by the 1949 Act as of December 31, 1949; (3) that the priority granted by Section 23(d) was in the nature of a gratuity and could not yield a vested right; (4) that Congress may withdraw gratuities without obligating the Government to pay just compensation; (5) that even if the alleged representations were made, they are not binding upon the Government or defendant, since neither the Coast Guard nor its negotiators had the authority to bind the Government to reconvey the property to plaintiff; and (6) that the parol evidence rule would preclude the introduction of any collateral agreements to vary the terms of the deed under which the Government acquired title to the property.

Plaintiff counters these arguments by contending (1) that he does not rely solely upon the 1944 Act but upon the contract of sale itself, which he maintains included promises regarding the provisions of the 1944 Act; (2) that he is the owner of a vested contractual right, rather than a gratuity, because the Act was made part of the

contract; (3) that valid contracts are property protected by the due process clause of the Fifth Amendment; and (4) that existing statutes at the time a contract is made become a part of it and must be read into it just as if an express provision to that effect were inserted into the contract.

The Court believes that defendant's motion to dismiss should be granted, since the complaint fails to state a claim upon which relief can be granted. Plaintiff has not answered the contention that any repurchase priority to which he was entitled was only temporary in nature and expired by the terms of the 1944 Act on December 31, 1949. Article 38 of the Surplus Property Act of 1944 fixed the expiration of the statute at the end of three years following the date of cessation of hostilities in World War II, which was December 31, 1946. The 1944 Act was not extended and was largely repealed by the 1949 Act. Logically, Congress intended to give no more than a temporary privilege of repurchase in the 1944 Act. Otherwise, property purchased during World War II that may not be determined surplus for the next fifty years would remain burdened by a repurchase priority, contrary to the transitional objectives from a wartime to peacetime economy expressed in the 1944 Act.

Furthermore, plaintiff fails to distinguish *Seidon* v. *Larson*, D.C., 1951, 188 Fed. (2d) 661, and *Mason* v. *United States*, Ct. Clms., 1959, 169 Fed. Supp. 507, which characterized the repurchase priority as a gratuity. His sole ground for distinguishing these cases is that the property therein was purchased prior to the enactment of the Surplus Property Act of 1944 rather than subsequent to the statute as in the case at bar. From this circumstance he argues that the right of repurchase was not in existence at the time of conveyance of the property and could not have been part of the contract of conveyance in the former cases. This argu-

ment ignores completely the legislative intent that is the sole basis for characterizing the repurchase priority. Since Section 23(d) covered property acquired by the Government after December 31, 1939, it is apparent that no distinction was intended between property purchased before and after the enactment of the statute. Likewise, plaintiff does not argue the essential nature of the repurchase priority. Considering the unrestricted power of Congress to dispose of property of the United States, the transitional purposes of the Surplus Property Act, and the limited duration of that statute, it is clear that the repurchase priority was not intended to confer any legal right in perpetuity but only to grant a privilege or gratuity that Congress may withdraw or redistribute at any time without obligating the Government to pay just compensation. *Cummings* v. *Deutsche Bank*, 1937, 300 U.S. 115, 57 S. Ct. 359, 81 L. Ed. 545; *Lynch* v. *United States*, 1934, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434. Finally, plaintiff gives no indication how he claims a vested right in such a gratuity.

Even if the representations concerning the repurchase priority were made, plaintiff does not meet defendant's contentions that would bar their admissibility in evidence or deny them any binding effect upon the Government. Parol evidence may not be introduced to add to, vary or contradict the terms of a written instrument which constitutes a consummation of the agreement of the parties to it. *Ramey* v. *Koons*, 5 Cir., 1956, 230 Fed. (2d) 802; In re Theodore A. Kochs Co., 7 Cir., 1941, 120 Fed. (2d) 603. Plaintiff does not allege a written contract of sale in his complaint but refers only to the deed which was executed on November 28, 1945. It conveys the entire title to the property without any reservations or restrictions whatever and makes no mention of any right of the grantors to repurchase the property. In *Mason* v. *United States*, *supra*, the parol evidence rule pre-

vented proof of representations varying the fee simple title conveyed to the Government in a similar situation involving the Surplus Property Act of 1944.

The Government would not be bound by any representations made by the Coast Guard or its negotiators since they did not have authority to bind the United States to reconvey the property on a priority basis. *Royal Indeminty Co.* v. *United States*, 1941, 313 U.S. 289, 61 S. Ct. 999, 85 L. Ed. 1429. There was no statute in effect during 1945 which conferred upon any officer or agent of the Coast Guard authority to bind the Government in the purchase contract to resell the property to former owners at the price for which the Government purchased the property. Any statements made by the negotiators were clearly beyond the scope of their authority and not binding upon the Government. *Federal Crop Insurance Corp.* v. *Merrill*, 1947, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10; *United States* v. *San Francisco*, 1940, 310 U.S. 16, 60 S. Ct. 749, 84 L. Ed. 1050; *Whiteside* v. *United States*, 1876, 93 U.S. 247, 23 L. Ed. 882.

Defendant's motion to dismiss will be granted for failure to state a claim upon which relief can be granted. No action is taken upon the other matters raised. The clerk will notify counsel to draft and submit order accordingly.

JOE INGRAHAM
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

• • •

OTIS HARRISON, TRUSTEE,
Plaintiff,

v.

DAVID S. PHILLIPS,
Defendant.

CIVIL ACTION
NO. 13,131

• • •

ORDER

In conformity with the Memorandum of the Court filed herein July 21, 1960,

IT IS ORDERED that this cause shall be, and it is hereby, in all things DISMISSED.

DONE at Houston, Texas, this ..... day of July, 1960.

.....
UNITED STATES DISTRICT JUDGE

APPROVED:
ARTHUR L. MOLLER
Assistant United States Attorney,
Attorney for Defendant.

APPROVED AS TO FORM:
BRACEWELL, REYNOLDS & PATTERSON

By: .....
Counsel for Plaintiff.

APPENDIX C

Conflicting D.C. Circuit Opinion

SEIDEN, et al v. LARSON, et al

No. 10596

United States Court of Appeals
District of Columbia Circuit

Decided March 15, 1951

Writ of Certiorari Denied June 4, 1951

See 71 S. Ct. 1017

Before EDGERTON, PROCTOR and WASHINGTON, Circuit Judges.

WASHINGTON, Circuit Judge.

This case involves an effort by former owners of real property, taken by the Government for war purposes, to reacquire it on a priority basis. The claim of plaintiffs (appellants) is based on section 23(d) (1) (A) of the Surplus Property Act of 1944[1] which provided, in substance, that former owners of "surplus real property . . . shall be entitled to purchase such property . . . at private sale . . . ."

The property here involved has been declared to be surplus. But the appellees, who are officials of the General Services Administration (successor to the remaining functions of the War Assets Administration), have determined that it is not "real property" within the meaning of section 23(d) because it is war housing, excluded from the coverage of section 23(d) by the provisions of section 23(a) of

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[1] 50 U.S.C.A. Appendix, §1632(d)(1)(A), Act of Oct. 3, 1944, c. 479, §23, 58 Stat. 777. For repealer provisions, see footnote 8, infra.

the Act. Accordingly, appellees have refused to recognize appellants' claim of priority and have offered the property for public sale.

I.

On a 169 acre tract at Lido, Long Island, appellants owned and operated a resort, comprising a hotel, a golf course, swimming pools, an ocean beach and other accommodations. The Secretary of the Navy took possession of the entire tract on September 8, 1942, and formal condemnation proceedings were completed in 1945, when the United States took title and paid the sum due. The property was converted into the Lido Naval Training Station.[2] After the termination of hostilities, in May, 1947, the entire property was declared surplus, and was turned over to the War Assets Administrator for disposition. In November of that year the hotel site (the south 54-½ acres of the tract) was sold to the appellants on a priority basis. All of the remaining property (115 acres in the northern part of the tract, encompassing primarily the former golf course) has been classified as "Non-Section 23" real property, i.e., as not within the statutory former-owner preference.

While appellants have objected to this classification as to the entire 115 acres, only a portion of the property is here in issue.[3] It is a 79 acre tract now occupied, in part,

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[2] The structures already on the property were utilized by the Navy, and in addition, some $4,000,000 was spent by it in the construction of a number of barracks, administrative buildings, warehouses, target ranges, and the like.

[3] After the entire property had been declared surplus, some 35.8 acres of the northern tract were transferred by the War Assets Administrator to the Hempstead School District for educational purposes on or about September 19, 1949, pursuant to the provisions of section 13 of the Surplus Property Act of 1944, 50 U.S.C.A. Appendix, §1622. While appellants object to that transfer, it is not involved in the instant proceedings.

by veterans' emergency housing built by New York State.[4] Appellants have negotiated at length with appellees in an attempt to reacquire this tract, but appellees have refused to change its classification as "Non-Section 23" real property.

On December 21, 1949, appellees advertised the 79 acres of property for sale to the public, "subject to existing occupancy of 23.8 acres for veterans' emergency housing until September 30, 1954." The appellants responded to this advertisement by submitting a bid. They also brought suit in the United States District Court for the District of Columbia on December 29, 1949, to restrain the appellees from disposing of the property to anyone other than the

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[4] Briefly, its history is as follows: Prior to declaring the entire property surplus, on October 26, 1946, the Navy Department issued a permit under Title V of the Lanham Act, as amended, (42 U.S.C.A. 1572(b)) to the Federal Public Housing Authority, covering this part of the property. The Federal Public Housing Authority thereupon entered into a contract with the New York State Division of Housing for the use of this land by the latter, for veterans' emergency housing. The permit from the Federal Public Housing Authority to the State authorities will expire on September 30, 1954. The State Division of Housing rebuilt certain of the structures put up by the Navy so as to make them usable as housing facilities. Twenty-three barracks buildings of cinder block construction were divided into family units with appropriate entrances, plumbing fixtures, and staircases. New York State spent some $500,000 in converting the barracks buildings for family use. The housing project is still in operation, and is tenanted by a large number of families on a low rental basis.

The buildings in the project cover an area of some 23.8 acres. The 79 acres, however, have been treated as a unit and appellants have not, so far as the record before us shows, suggested that this was improper in that the 23.8 acres should be considered separately. A single determination as to the entire 79 acres has been sought.

appellants. On Mach 7, 1950, the District Court granted appellees' motions to dismiss the complaint and for summary judgment.[5] It is from this judgment that appeal is taken.

II

[1] In cases of this sort, where the plaintiff challenges action by an administrative official relative to Government property, two questions are commonly posed at the outset: (1) Does the plaintiff have standing to sue, and (2) is the suit actually one against the United States, to which it has not consented? These questions are of necessity closely inter-related, and in fact they sometimes blend together. For if the suit is one against the United States and no consent to its maintenance has been given, it is clear that no one is entitled to sue, and the extent of the plaintiff's interest in the matter is immaterial.[6] If the suit is not against the United States, the nature of the plaintiff's interest becomes relevant; the courts must decide whether that interest is such as to entitle him to judicial protection

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[5] An injunction was granted pending appeal.

[6] If the suit is one against the United States and Congress has expressly consented to its maintenance, the inquiry takes a new form; the courts must decide whether the plaintiff is included in the class authorized by Congress to obtain relief, and whether he has properly pursued the statutory remedy.

At the same time, of course, a Federal constitutional court cannot review administrative action unless there is a "case or controversy" within the meaning of Article III of the Constitution; if this is lacking, even an express statute cannot validly authorize judicial review. Muskrat v. United States, 219 U.S. 346, 31 S. Ct. 250, 253, 55 L. Ed. 246; see, generally, Davis, Standing to Challenge and to Enforce Administrative Action, 49 Col. L. Rev. 759.

against the conduct of which he complains, on the part of the individual defendant he has sued.[7]

[2, 3] In the present situation appellants rely on section 23(d) of the Surplus Property Act, which provided that former owners of "surplus real property . . . *shall be entitled* to purchase such property . . . at private sale . . .", as giving them standing to maintain this suit.[8] (Emphasis supplied.) There is no doubt that acquisition of the property here involved is of greater practical interest to appellants as former owners than to ordinary prospective purchasers, and that interests of this sort were recognized by Congress in the quoted provision. But if this suit is against the United States, that is not enough. "When the claims

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[7] See Stark v. Wickard, 321 U.S. 288, 304, 64 S. Ct. 559, 88 L. Ed. 733. Persons selling to or buying from the Government are ordinarily said to be without standing to maintain suit against administrative officials to enforce the conditions and methods of sale or purchase established by Congress. Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108; Fulton Iron Co. v. Larson, 84 U. S. App. D. C. 39, 42, 171 F. 2d 994, 997, certiorari denied 336 U.S. 903, 69 S. Ct. 489, 93 L. Ed. 1068. This result could equally well be expressed in other terms; the fact is that such matters are not ordinarily reviewed by the courts at the instance of any plaintiff whatever, no matter how much damage he has suffered.

[8] Section 23(d), however, is no longer in effect; section 502(a) of the Federal Property and Administrative Services Act repealed the Surplus Property Act as of June 30, 1949. Act of June 30, 1949, c. 288, Title VI, § 502 (a), 63 Stat. 399, 400. While priorities as to surplus real property were continued in effect by the new act until December 31, 1949, that date has long since passed. It may well be that after December 31, 1949, appellants lost whatever standing they may theretofore have possessed, notwithstanding their efforts to establish their position prior to that date. Benefits granted by Congress can be withdrawn by Congress. Lynch v. United States (Wilner v. U.S.), 292 U.S. 571, 577, 54 S. Ct. 840, 78 L. Ed. 1434. We are reluctant, however, to decide the case on the narrow basis that appellants' interest has ceased, and that their present status is merely that of a member of the general public.

created are against the United States, no remedy through the courts need be provided. . . . To reach the dignity of a legal right in the strict sense, it must appear from the nature and character of the legislation that Congress intended to create a statutory privilege protected by judicial remedies." Stark v. Wickard, 321 U.S. at page 306, 64 S. Ct. at page 569. Since no such intent was manifested in the Surplus Property Act, either expressly or by implication,[9] appellants have no "legal right" as against the Government. Regardless of what their status may be in some other context, if this is a suit against the United States, it cannot be maintained.

III.

[4] The question whether a suit against an administrative officer named individually is in fact a suit against the United States has long been — and continues to be — a problem of great difficulty. One of the areas where it is most difficult to avoid the conclusion that the suit is in reality against the United States is where Government property is involved. Certainly "a proceeding against property in which the United States has an interest is a suit against the United States." *State of Minnesota* v. *United States*, 305 U.S. 382, 59 S. Ct. 292, 294, 83 L. Ed. 235. So too where the proceeding is not directly against the property but will affect the Government's interest in it: *State of Minnesota* v. *Hitchcock*, 185 U.S. 373, 22 S. Ct. 650, 46 L. Ed. 954. The Court there held: ". . . the legal title to these lands is in the United States. The officers named as defendants

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[9] It may be noted that functions conferred by the Surplus Property Act, 50 U.S.C. Appendix, § 1611 et seq., were specifically excluded from the operation of most of the provisions of the Administrative Procedure Act, including the provisions for judicial review. 5 U.S.C.A. § 1001 (a).

have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the state. The United States is therefore the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter." 185 U.S. at page 387, 22 S. Ct. at page 655. See also, *State of Oregon* v. *Hitchcock*, 202 U.S. 60, 26 S. Ct. 568, 50 L. Ed. 935. Nor is this reasoning confined to situations where the plaintiff seeks to divest the Government of title. *See Nagauah* v. *Hitchcock*, 202 U.S. 473, 476, 26 S. Ct. 667, 50 L. Ed. 1113. The Supreme Court, in summing up such decisions, indicated that "where the sovereign admittedly has title to property and is sued by those who seek to compel a conveyance or to enjoin disposition of the property, the adverse claims being based on an allegedly superior equity or on rights arising under Acts of Congress," suit cannot be maintained in the absence of consent on the part of the United States. *Land* v. *Dollar*, 330 U.S. 731, 737, 738, 67 S. Ct. 1009, 91 L. Ed. 1209.

[5] In the instant case it is undisputed that the property in question belongs to the United States. Appellants contend, however, that under principles announced in the recent decision of the Supreme Court in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628, this suit can be maintained. We do not think that the Larson decision aids appellants. Unlike the case here at hand, the Larson case was concerned with a situation where plaintiff claimed title, and alleged that the defendant Government official was tortiously withholding *plaintiff's* property. And the Court held that even under those circumstances," ... the action of an officer of the sovereign (be it holding, tak-

ing or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for a specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." 337 U.S. at page 701-702, 69 S. Ct. at page 1467. The Court did not hold that where Government property was concerned a showing of lack of statutory authority would suffice. To the contrary, it specifically noted that: "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." 337 U.S. 682, note 11, 69 S. Ct. 1457.[10]

The reason for this distinction is patent. The Government has a vital interest in the disposition of its property. On the other hand, where a Government official commits a trespass against a citizen's property, and is not acting under valid statutory authority, "the Government is not held to have sufficient interest in the controversy to be considered an indispensable party." *Mine Safety Co. v. Forrestal*, 326 U.S. 371, 374, 694, 66 S. Ct. 219, 221, 90 L. Ed. 140. Thus, in the words of Mr. Justice Frankfurter: "Of course where the United States is the owner in possession of property a court cannot interfere without the Government's consent."

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[10] The Court also noted that the jurisdiction of the District Court would not extend to the granting of a declaratory judgment declaring plaintiff's rights vis-a-vis the United States. 337 U.S. at page 689, note 9, 69 S. Ct. 1457, citing Stanley v. Schwalby, 162 U.S. 225, 16 S. Ct. 754, 40 L. Ed. 960.

Larson v. *Domestic & Foreign Corp.*, 337 U.S. 682, 725, 69 S. Ct. 1457, 1479, 93 L. Ed. 1628 (dissenting opinion).

Applying these principles to the case at hand, it would seem that appellants' suit must fail and this would be true even if appellants were correct in their contention that appellees had acted beyond their statutory authority and contrary to congressional mandate. For no one has questioned that the United States has title to the property which is the subject of this suit. The objectives of the suit are to prevent the General Services Administrator from disposing of that property to persons other than appellants and to pave the way for their reacquisition of the property. The court is asked to enjoin appellees from selling the property to anyone other than appellants, from leasing or licensing it in a manner which would deprive appellants of their right to immediate possession, and from classifying the property as "Non-Section 23" real property. While the prayers for relief are expressed largely in negative terms, in substance and in fact the ultimate relief which appellants seek could hardly be obtained without "affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Larson* v. *Domestic & Foreign Corp.*, *supra*. Accordingly, this is a suit against the United States.[11]

IV.

What we have said is perhaps sufficient to dispose of the case. But there is an alternative ground of decision. In the *Larson* case the Supreme Court made clear that a suit against a Government official "relief can be granted, with-

[11] Lambert v. Reconstruction Finance Corp., D. C., 71 F. Supp. 509; O'Harra v. Littlejohn, D.C., 69 F. Supp. 274; Fulton Iron Co. v. Larson, 84 U.S. App. D.C. 39, 171 F. 2d 994, certiorari denied 336 U.S. 903, 69 S. Ct. 489, 93 L. Ed. 1068; Goldberg v. Daniels, 231 U.S. 218, 34 S. Ct. 84, 58 L. Ed. 191.

out impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." 337 U.S. 690, 69 S. Ct. 1461. Appellants contend that the Administrator's action was beyond his statutory jurisdiction. We think that in substance appellants' claim amounts to no more than that the Administrator acted erroneously.

The provision in section 23(d) of the Surplus Property Act of 1944 that former owners of "surplus real property . . . shall be entitled to purchase such property, in substantially the identical tract as when acquired from such person, at private sale" was made applicable only to surplus "real property" within the definition given in section 23(a) (1). That definition specifically excluded from the coverage of section 23(d) three very extensive categories:

". . . (A) commercial structures constructed by, at the direction of, or on behalf of any Government agency, (B) commercial structures which the Administrator determines have been made an integral part of a functional or economic unit which should be disposed of as a whole, and (C) war housing, industrial plants, factories, airports, airport facilities, or similar structures and facilities, or the sites thereof, or land which the Administrator determines essential to the use of any of the foregoing. . . ."

And Congress gave the Administrator broad power to determine whether property was included within section 23(d), and to classify it on the basis of its highest and best use.[12] In addition, Congress directed the Administrator to consider many facets of public policy. Often, as with

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[12] Section 23(e) of the Act provided:

> "Immediately after the reporting of surplus real property to the War Assets Administrator under Section 11, the War Assets Administrator shall classify such property as

the former owner provision of section 23(d), these directives were incorporated into the provisions relative to priorities.[13] Under the Surplus Property Act it is apparent that the problem of classifying and disposing of property was one involving a large measure of discretion. Necessarily included in the exercise of the Administrator's discretion in the disposal of property was an interpretation of the objectives of the Act, as well as a fitting of the facts into the various statutory classifications. And the right or privilege given by section 23(d) must thus be placed within its context, in an act of some complexity, where it was but one of many provisions directing the agency administering the Act in the performance of its task.

Here there is no question but that the Administrator had the power, and also a duty, to make a determination as to the best use of the property, and as to whether it was surplus real property covered by section 23(d). The statu-

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agricultural, grazing, forest, mineral, or otherwise, as it may deem advisable. The classification may be revised from time to time. *The classification of property by the Administrator (including the determination of whether property is 'real property' as defined in this section) shall be based on the highest and best use of the property at the time it is reported as surplus property regardless of its former character or use.*"

(Emphasis added.) 58 Stat. 777, as amended, 59 Stat. 533, 60 Stat. 886, 61 Stat. 952.

[13] The needs of the various branches of the Federal Government (Act of October 3, 1944, c. 479, §12, 58 Stat. 770) the aiding of hospitals and educational projects, the desirability of transferring property to the states, so as to relieve tax burdens which might otherwise have to be imposed, (id. at §13) and the desirability of providing business opportunities for veterans, (id. at §16, 58 Stat. 773) — all of these objectives were expressed by way of statutory preferences in acquisition of surplus property.

The Act also provided for the prevention of discrimination against small businesses, for a preference to purchases of small amounts, (id. at §18) and for the stockpiling of strategic materials, (id. at §22, 58 Stat. 776).

tory authorization was specific; appellants cannot and do not dispute this. Appellants' argument that the Administrator was under a statutory duty to sell the property to them rests upon their further contention that the classification of the property as coming within the statutory category "war housing . . . or similar structures and facilities," thus removing it from the former owner priority provisions, was erroneous and arbitrary.

[6, 7] We do not think the action taken by appellees was unreasonable. The statutory background of appellees' determination makes clear that "war housing" was not a narrow technical term confined to projects built pursuant to a single statute.[14] Further, Congress did not restrict the exemption to "war housing." On the contrary, section 23(d) referred to "war housing . . . or similar structures and facilities," indicating congressional intent not only to attach broad meaning to the term but also to supplement it

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[14] Housing for defense purposes was originally authorized by the Act of June 28, 1940, 54 Stat. 676, 50 U.S.C.A. Appendix, §1151 et seq., followed by the Lanham Act of October 10, 1940, 54 Stat. 1125, 42 U.S.C.A. §1521 et seq. Both of these 1940 Acts referred to housing for persons engaged in "defense" activities. In 1942 amendments were made to the 1940 Acts, and in certain of these amendments the term "war housing" is used. Act of May 26, 1942, 56 Stat. 301. Thereafter, the term "war housing" was frequently used in congressional debates and elsewhere to refer to housing constructed under the 1940 and 1942 Acts. But at the same time it seems clear that the term "war housing," as used in section 23(a) of the Surplus Property Act of 1944, was not intended to be confined to housing constructed under the 1940 and 1942 Acts, or more specifically, to housing constructed under the Lanham Act of October 10, 1940. Such an interpretation would render the "war housing" category meaningless and unnecessary, for Lanham Act housing was excluded by section 34(b) of the Surplus Property Act from that Act's coverage. And the fact is that a substantial amount of housing for defense and war purposes was constructed under statutory authority other than the Lanham Act. See Appropriation Act of September 9, 1940, 54 Stat. 883, 884.

by a further wide category of comparable projects. Housing constructed to fill the needs produced by demobilization would appear, on the face of it, to be such a comparable project. When consideration is given to the statutory policy that the new rather than the former condition and potentialities should be controlling in determining whether the property should be classified as "real property," the conclusion reached by the Administrator is given additional justification. The three categories of exclusion set forth in section 23(a) (1) evinced a congressional intent that former owners should not be entitled to reacquire at private sale properties which had been the subject of large expenditures by the Government, resulting in improvements of a kind not so related to the former use of the property or so personal to the former owner as to give rise to any equitable claim by him to the improved property. The desire of Congress was to put such property back into channels of disposition based on its improved condition, rather than to recognize any claim of the former owner to regain it. In this regard we must also note that after VE-Day and VJ-Day Congress provided on a large scale for veterans emergency housing. Not only was the use of funds for the construction of new housing projects authorized but also the use of Federal surplus property, wherever feasible, for the creation of housing for veterans, "notwithstanding any other provisions of law". 42 U.S.C.A. §1572(b). It was pursuant to this statutory mandate that the structures on the former Lido golf course were made available to the Federal Public Housing Authority, and through that Authority to the New York State Division of Housing, for the purpose of providing emergency housing for veterans.

The Administrator's determination that the term "war housing . . . or similar structures and facilities" included veterans' emergency housing of the type here in question

thus would seem well founded. In any event, it certainly does not rest upon considerations which only a capricious exercise of power could explain. And we need not decide whether, if this court were determining the question in the first instance, it would reach the same result. Where billions of dollars of assets are involved, and a vast system of priorities established, the official having authority to classify the property and determine which priorities are applicable is bound to err at times. To say that erroneous classification is beyond the Administrator's statutory authority, and thus to subject the whole disposal system to the slow process of judicial review, was certainly not within the intent of Congress. Nor is it called for by the decision of the Supreme Court in the Larson case. The court there specifically pointed out that action by an officer of the Government is no less official action when "based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so." 337 U.S. at page 695, 69 S. Ct. at page 1464. As Justice Douglas pointed out in the concurring opinion in that case, "the principles announced by the Court are the ones which should govern the selling of government property. Less strict applications of those principles would cause intolerable interference with public administration." 337 U.S. at page 705, 69 S. Ct. at page 1469. We must hold that even if appellants were correct in their contention that the Administrator's classification of the property as war housing was erroneous, this suit cannot be maintained. It is against the United States, and the United States has not consented to be sued.

The judgment of the District Court must therefore be AFFIRMED.

Excerpt from D.C. Circuit Opinion

WEST COAST EXPLORATION CO.

v.

McKAY, Secretary of Interior.
No. 11187

United States Court of Appeals
District of Columbia Circuit

Decided Jan. 26, 1954

Writ of Certiorari
Denied June 1, 1954

See 74 S. Ct. 850.

. . . 11-13 The second aspect of the jurisdictional question, whether or not the District Court had the necessary parties before it — in the absence of such parties a court of course cannot validly enter a judgment — arises by virtue of a contention that since the suit is filed against the Secretary of the Interior and involves the disposition of public lands the District Court could not consider the case, but should have dismissed it forthwith as a suit against the United States which had not consented to be sued. In our opinion that contention is not supportable in view of the method recognized by the Supreme Court in the following cases for determination of similar preliminary jurisdictional questions. *Payne* v. *Central Pac. Ry. Co.*, 255 U.S. 228, 41 S. Ct. 314, 65 L. Ed. 598 (1921); *Northern Pac. Ry. Co.* v. *State of North Dakota ex rel. Langer*, 250 U.S. 135, 39 S. Ct. 502, 63 L. Ed. 897 (1919); *Wells* v. *Roper*, 246 U.S. 335, 38 S. Ct. 317, 62 L. Ed. 755 (1918); *Lane* v. *Watts*, 234 U.S. 525, 34 S. Ct. 965, 58 L. Ed. 1440

(1914); *United States* v. *Lee*, 106 U.S. 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882); *Transcontinental & Western Air* v. *Farley*, 71 F. 2d 288 (2d Cir.), certiorari denied, 293 U.S. 603, 55 S. Ct. 119, 79 L. Ed. 695 (1934). The rulings in those cases, each commenced upon the theory that Government officers were acting without power, and holding in the Northern Pacific, the Lee, the Payne, and the Lane cases, the United States not a necessary party, and in the Farley and Roper cases, a necessary party, are explainable as follows: Where a plaintiff asserts in his complaint that an officer of the Government is acting without power and that therefore his acts are invalid, the Court, in determining the preliminary jurisdictional question whether or not the United States is a necessary party, is confronted with a problem arising out of the fact that the determination of that question involves passing upon the very question involved in the merits. For example, in the Northern Pacific case, brought to restrain the Director General of Railroads, who had imposed a schedule of intrastate rates, from enforceing the same, upon the ground that he had no power except respecting interstate rates, the question arose at the threshold whether or not the United States was a necessary party. Necessary parties are those "affected by the judgment and against which in fact it will operate . . . ." *Minnesota* v. *Hitchcock*, 185 U.S. 373, 387, 22 S. Ct. 650, 655, 46 L. Ed. 954 (1902). If the Director General had no power over intrastate rates, then the United States was not a necessary party because it had nothing to do with the imposition and enforcement thereof, and a judgment restraining the effectiveness of the schedule would operate only against the Director General individually. If, on the contrary, the Director General had power over intrastate rates, then the United States was responsible for his imposing and enforcing the schedule and the judgment would operate

against it. Thus the ultimate question was also the jurisdictional question. A similar problem was presented in each of the cases just cited. Since a court must determine at the outset its jurisdiction to consider a case presented, it is compelled to make a preliminary decision, for jurisdictional purposes, on the ultimate question in the suit, and this notwithstanding the fact that if jurisdiction to consider the case is recognized, and the merits of the claim for relief therefor heard, the Court may, on the merits, be compelled to reach an opposite conclusion.

The Courts solve this problem by accepting at their face value, for jurisdictional purpose, the assertions of the complainant of want of power in the officer — unless such assertions are "so unsubstantial and frivolous as to afford no basis for jurisdiction . . ."[13] — and by giving the assertions thus accepted their natural jurisdictional consequences in respect of who are necessary parties.[13a] Thus in the Northern Pacific case the Court, to determine whether the United States was a necessary party, accepted as true the assertion of want of power in the Director General, and therefore held that the United States was not a necessary party, and this although when the merits were passed on, the Court reached the conclusion that the Director General did have power to

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[13] Northern Pac. Ry. Co. v. State of North Dakota, ex rel. Langer, supra, 250 U.S. at page 152, 39 S. Ct. at page 396.

[13a] It is to be noted that this method of solving the jurisdictional problem is not substantially different from that followed in determining whether or not a cause of action is stated in a complaint. On demurrer, or motion to dismiss, the court accepts as true, unless they are palpably unsubstantial and frivolous, the allegations of the complaint; if, so accepting them, the court finds that the facts stated constitute a cause of action the court will hear the case — and this notwithstanding the fact that upon the hearing it may appear that the allegations are not substantiable and that the case must therefore be dismissed upon the merits.

impose and enforce the local rates. Again in the Lee case the Court accepted, for jurisdictional purpose, the assertions of the plaintiff that the officers holding the Lee property for the Government were without power so to do, and therefore held the Government not a necessary party. In that instance the jurisdictional holding coincided with the ultimate holding. A similar result for the same reason was reached in the Payne and Lane cases. In the Farley case the same jurisdictional method resulted in holding the Government a necessary party. The assertion was that Farley was without power to cancel air mail contracts which had been entered into between the United States and the complainant. Accepting that assertion at face value for jurisdictional purpose, the consequence was that if Farley was without power to cancel the contracts the Government was bound to perform them; therefore it was a necessary party; and it was so held. Again in the Roper case the same result was reached on similar facts and for the same reason.

It is to be noted that the foregoing method of solving the preliminary jurisdictional question in such cases as the instant case and those just discussed was approved by the Supreme Court in *Land* v. *Dollar*, 330 U.S. 731, 738-739, 67 S. Ct. 1009, 1012, 91 L. Ed. 1209 (1946) where the Court said:

> ". . . But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.
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> "It is in the latter category that the pleadings have cast this case. That is to say, *if the allegations of the petition are true*, the shares of stock never were prop-

erty of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States, suit to recover them would of course be a suit against the United States. But if it is decided on the merits either that the contract was illegal or that respondents are pledgors, they are entitled to possession of the shares as against petitioners, though, as we have said, the judgment would not be *res judicata* as against the United States. See United States v. Lee, supra, 106 U.S. 196, p. 222, 1 S. Ct. 240." (Emphasis supplied.)

See also *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 66 S. Ct. 219, 90 L. Ed. 140 (1945), wherein the Court recognized, in the words quoted below, the foregoing method of solving such a jurisdictional question as is presented in the instant case, although the Court's ultimate decision was that the United States was a necessary party:

". . . Appellant contends that the action seeks to prevent a tort by the Secretary, acting as an individual and not as an officer of the government, consisting of a trespass against appellant's property, and that equitable relief is necessary because appellant has no adequate remedy at law and since it would otherwise suffer irreparable loss. Under our former decisions, had the factual allegations supported these contentions, the complaint as filed would, in the absence of any further proceedings, have provided a basis for the equitable relief sought. See e.g., Philadelphia Company v. Stimson, 223 U.S. 605, 619-620, 32 S. Ct. 340, 56, L. Ed. 570. For according to these cases, if we assume, as we must for the purpose of disposing of the jurisdictional issue, that appellant's allegations including the one that the Renegetiation Act is unconstitutional are true, the fact that the Secretary had acted pursuant to the command of that statute would have made no difference. These cases hold that a public officer cannot justify a trespass against a person's property by invoking the command

> of an unconstitutional statute. Under such circumstances, *the tort becomes the officer's individual responsibility,* and the government is not held to have sufficient interest in the controversy to be considered an indispensable party." (326 U.S. at 373-374, 66 S. Ct. at 221.) (Emphasis supplied.)

[14] If in the instant case the foregoing method of solving the preliminary jurisdictional question as to the need *vel non* of the presence before the District Court of the United States as a party defendant can be applied, the result will be as follows: As pointed out at the outset of this opinion, the petition of West Coast in effect asserted that in rejecting the West Coast selection of Little Placer, and application for a patent thereto, the Secretary was acting beyond or in want of statutory power. It can not be said that that assertion is "so unsubstantial and frivolous as to afford no basis for jurisdiction . . .". Accepting the assertion for the preliminary jurisdictional purpose only, as true, the action is not one against the United States but one to compel the Secretary of the Interior, himself, to perform a clear legal duty. Therefore, the Secretary, not the United States, is the necessary party defendant; his presence before the District Court was not in dispute; and West Coast was of course before the Court by virtue of its own petition. Therefore the District Court had before it the necessary parties and in that aspect of the jurisdictional question was empowered to proceed and consider the case.

It is however contended that the decision of the Supreme Court in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), stands in the way of reaching such a conclusion and of the method of reaching it above outlined. We think that that contention is not valid. The charge in the complaint filed in the United

States District Court for the District of Columbia in the Larson case was, in effect, that the War Assets Administration was refusing to perform a contract for the sale of surplus coal, which contract had been consummated with resultant title in the plaintiff, Domestic and Foreign Corporation. But it also appeared from the allegations of the complaint that there was a dispute between War Assets and the plaintiff as to whether or not the conditions required by War Assets for purchase of the coal had been fulfilled. In brief, the action or inaction questioned in the Larson case was that of War Assets in the exercise of its authority in disposing of surplus property of the Government and in negotiating and performing contracts for such disposal. It was not charged in the complaint that War Assets had acted beyond that authority or unconstitutionally. The relief prayed for was a declaration by the District Court that the contract of sale by War Assets to the plaintiff was valid and that a purported sale to a third party was invalid; and an injunction was sought preventing disposition of the coal to the third party. The District Court held that the relief sought in the complaint was against the United States and therefore dismissed the suit for lack of a necessary party, the Government not having consented to be sued. This Court of Appeals reversed. The Supreme Court on certiorari affirmed the decision of the District Court. It did so, as we read the case, because the allegations of the complaint, looked at for the purpose of determining whether or not the District Court had the necessary parties before it, charged erroneous action on the part of War Assets within its authority and not conduct beyond the power of War Assets or of unconstitutional character. In respect of such conduct (i.e., conduct beyond the power of a Government official or of unconstitutional character) alleged in a complaint against a Government official, the Supreme Court

in the Larson case definitely recognized exceptions. On this subject it said:

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. If the War Assets Administrator had completed a sale of his personal home, he presumably could be enjoined from later conveying it to a third person. On a similar theory, where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient. And, since the jurisdiction of the court to hear the case may depend, as we have recently recognized, (Here the Court, in footnote, cited *Land* v. *Dollar* from which we quote *supra.*) upon the decision which it ultimately reaches on the merits, it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies.
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> "A second type of case is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional. Actions for *habeas corpus* against a warden and injunctions against the threatened enforcement of unconstitutional statutes are familiar examples of this type. Here, too, the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign. The only difference is that in this case the power has been conferred

in form but the grant is lacking in substance because of its Constitutional invalidity.

"These two types have frequently been recognized by this Court as the only ones in which a restraint may be obtained against the conduct of Government officials." (337 U.S. at 689-690, 69 S. Ct. at 1461.)

The Court said also:

". . . Since we must therefore resolve the conflict in doctrine . . . we adhere to the rule applied in the Goldberg case (Goldberg v. Daniels, 231 U.S. 218, 34 S. Ct. 84, 58 L. Ed. 191 (1913) and to the principle which has been frequently repeated by this Court, both before and after the Goltra case (Goltra v. Weeks, 271 U.S. 536, 46 S. Ct. 613, 70 L. Ed. 1074 (1926)): the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void. . . ." (337 U.S. at 701-702, 69 S. Ct. at 1467).

It is to be noted that the allegations of the petition filed in the instant case place the case, for the jurisdictional purpose, so far as the questioned need of the United States as a party is concerned, clearly within the first of the two exceptions noted by the Supreme Court. That Court in the Larson case did not refer to, but cannot, we think, be said to have overruled its decisions in *Payne* v. *Central Pac. Ry. Co.*; *Norther Pac. Ry. Co.* v. *State of North Dakota ex rel. Langer*; *Wells* v. *Roper*; *Lane* v. *Watts*; *United States* v. *Lee*; *Transcontinental & Western Air* v. *Farley*; and *Mine Safety Appliances Co.* v. *Forrestal*, *supra*.

It is true that there is a statement by this Court of Appeals in *Seiden* v. *Larson*, 88 U.S. App. D.C. 258, 188 F. 2d 661 (D.C. Cir. 1951) at page 665, under topic III, which

purports to construe the Larson case as decided by the Supreme Court as holding that the jurisdictional exceptions above described are not applicable in cases in which Government property is involved. The statement is to the effect that "The Court did not hold that where Government property was concerned a showing of lack of statutory authority would suffice." That statement in *Seiden* v. *Larson* is based upon footnote 11 appearing at page 691 of 337 U.S., at page 1462 of 69 S. Ct.[14] But we think that the holding of the Larson case is as above described in this opinion and that its ruling recognizing the two jurisdictional exceptions is not modified or lessened in force by the footnote referred to, and that it does not preclude the application of the exceptions to cases in which Government property is involved. Accordingly, to the extent that the decision in *Seiden* v. *Larson* construes the decision of the Supreme Court in the Larson case in a manner in conflict with our understanding of that decision, it is, in our view, erroneous, and is overruled. It is to be noted further that *Seiden* v. *Larson* does not discuss either aspect of the preliminary jurisdictional question which is the subject of the present discussion in the instant case — it deals only with the merits — and it does not take into account the authorities relating to that question which are relied upon supra. It is to be still further noted that the allegations of the complaint filed in the District Court in *Seiden* v. *Larson* do not charge action by a Government officer beyond statutory authority or without constitutional basis.

[14] Footnote 11 in the Larson case reads as follows: "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. North Carolina v. Temple, 134 U.S. 22, 10 S. Ct. 509, 33 L. Ed. 849 (1890)."

[15] Since it is elementary that action or inaction of a public officer beyond or in want of statutory (or Constitutional) authority may be corrected by suit against the officer individually and that the Government is not, under such circumstances, a necessary party, the contention that the Larson case rules that even though a public officer is charged with action, or inaction, beyond or without lawful authority this may not be corrected by a suit against the officer alone, if the case involves the disposition of public lands, is an extreme contention indeed. Under such a ruling a person who had, under the homestead laws, fully satisfied the requirements for residence and cultivation and who had paid the required fees could be denied a patent to the land by the Secretary of the Interior acting wholly arbitrarily and the homesteader would be without recourse in the courts. The Courts would be obliged under such a construction of the Larson case as is contended for to refuse to consider the case. Under such a ruling the locator of a mining claim who had made the required discovery of ore, performed the required assessment work and paid the necessary fees, could be arbitrarily denied a patent and there would be no recourse in the courts. Such a denial of recourse to the Courts would be abhorrent to the justice according to law contemplated by the Constitution. The due process clause of the Fifth Amendment endows the United States Courts with power, even though there is no statutory provision for direct review of the action of a public officer. No such meaning of the Larson case as is contended for can, in our view, be attributed to the Supreme Court.

We think, therefore, that the decision in the Larson case does not stand in the way of reaching such a conclusion on the second aspect of the jurisdictional question as is above stated.